

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

TREMONT STREET THEATRE CORP. II
d/b/a WILBUR THEATRE

Employer-Petitioner¹

and

TREASURERS AND TICKET SELLERS,
LOCAL 753 a/w INTERNATIONAL
ASSOCIATION OF THEATRICAL
STAGE/EMPLOYEES, AFL-CIO

Union

Case 1-UC-792

In the Matter of

BOYLSTON STREET THEATRE CORP.
d/b/a COLONIAL THEATRE

Employer-Petitioner

and

TREASURERS AND TICKET SELLERS,
LOCAL 753 a/w INTERNATIONAL
ASSOCIATION OF THEATRICAL
STAGE/EMPLOYEES, AFL-CIO

Union

Case 1-UC-793

¹ The name of the Employer-Petitioner in Case 1-UC-792 appears as amended at the hearing.

DECISION AND ORDER²

The Employer-Petitioners (referred to individually as the Wilbur Theatre and the Colonial Theatre) in these matters filed petitions seeking to clarify the bargaining units that the Unions currently represent³ by removing from the units the positions of treasurer on the ground that they are supervisors within the meaning of Section 2(11) of the Act. The Union maintains that the treasurers are not supervisors and are properly included in the units. The Union further maintains that the petitions are barred by a Memorandum of Agreement (hereinafter the “MOA”) that both Employer-Petitioners entered into with the Union in July 2000. In the MOA, the parties agreed that the treasurers were members of the bargaining unit and were covered by their existing collective-bargaining agreements.

I find that the petitions are not barred and that the Employer-Petitioners have not sustained their burden of proving that the treasurers are statutory supervisors. Accordingly, I conclude that the treasurers are properly included in the bargaining units and that the petitions must be dismissed.

BARGAINING HISTORY

The Employer-Petitioners are parties to separate agreements with the Union. The agreement between the Colonial Theatre and the Union is effective from September 1, 1998 through August 31, 2002, as amended August 11, 2000. The agreement between the Wilbur Theatre and the Union is effective August 11, 2000 through August 31, 2002. Section 3 of each agreement provides, in identical language, that the agreement applies “to and cover(s) all box office treasurers, assistant box office treasurers and ticket sellers employed by the EMPLOYER in Boston” (emphasis in original).

Prior to the current agreements, for approximately 40 years, the Employer-Petitioners and the Union had been parties to several agreements that included the treasurers. On June 8, 2000, the Wilbur Theatre filed a petition in Case 1-UC-758 seeking to exclude the treasurer from the bargaining unit. On June 28, 2000, the Wilbur informed the Union that because the Board refused to postpone the hearing in that case, it would withdraw the petition, but it reserved the right to file another UC petition in the subsequent two weeks. The Wilbur went on to inform the Union that, if the parties successfully executed an agreement concerning the treasurer prior to the scheduled hearing date in its refiled unit clarification petition, the Wilbur would withdraw the refiled petition. The Union accepted the Wilbur’s offer. On June 29, 2000, the Wilbur withdrew its petition in Case 1-UC-758. On July 27, 2000, the parties

² Upon petitions duly filed under Section 9(b) of the National Labor Relations Act, as amended, a consolidated hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed; and 2) the Employer-Petitioners are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

³ The units consist of all box office treasurers, assistant box office treasurers, and ticket sellers.

entered into a MOA whereby they agreed, in pertinent part, that the treasurer would continue to be a member of the bargaining unit and would be covered by the parties' agreement.

OVERVIEW OF THE THEATRES

The Employers operate theatres that present productions to the public. The Colonial Theatre is a 1700 seat theatre built in 1900. In around 1989, the Boylston Street Theatre Corporation acquired the Colonial theatre. The Colonial Theatre primarily hosts touring musical shows. The Wilbur Theatre mostly presents dramatic shows. Both theatres employ stage hands, wardrobe, teamsters, and box office staff. The box office staff consists of the treasurer, the assistant-treasurers, and the ticket sellers. The Colonial Theatre also employs musicians.

American Artists Inc. (hereinafter "American Artists") is a sister company of the Employers. American Artists manages the theatres and employs the staff who perform the administrative and managerial functions involved in presenting the shows. American Artists has employees in its Finance, Marketing, Group Sales, Subscription, and Operations departments. Although the offices of American Artists are located in the same facility as the Colonial Theatre, the employees of American Artists do not work at either theatre. The organizational structure of American Artists is comprised of President Bill Conner and Vice President and General Manager Sondra Katz. Below Katz are the Directors of Operations, Finance, and Marketing. The Directors all report to Katz, who in turn reports to Conner. Janis Lippman is the Director of Operations for American Artists. As the Director, she oversees the operations of the theatres.

The Colonial and the Wilbur theatres have box offices through which they sell tickets to the public. In addition to the ticket sellers, the Colonial Theatre employs treasurer Robert Foley and assistant-treasurers Rick Britton, Steve Finn, and James Griffin. Similarly, in addition to ticket sellers, the Wilbur Theatre employs treasurer Diane Campbell and assistant treasurers Rafaella DeGruttola and Stephen Colburn. When the Wilbur Theatre is closed, Campbell assists Foley at the Colonial Theatre.

The box office of the theatres operates up to seven days a week. The general hours of operation are Monday through Saturday from 10:00 a.m. to 6:00 p.m. on non-performance days, and 10:00 a.m. to curtain time, which is generally at 8 p.m., on performance days. On Sundays when there is a performance, the box office is generally open from 12:00 p.m. until curtain time.

DUTIES OF THE TREASURER

The parties disagree over the duties of the treasurer. Each party presented one witness at the hearing. The Employers presented Director of Operations Lippman, and the Union presented Campbell, who is the treasurer at the Wilbur Theatre and was an assistant-treasurer prior to becoming treasurer.

As stated above, the treasurers report to the Director of Operations. In addition, in the course of their duties, they interact constantly with the Vice President, the General Manager, and the Director of Marketing, particularly with respect to setting up and promoting shows.

Under the collective-bargaining agreement, the treasurers are paid a higher salary than all other box office employees.⁴

A. General duties

At the hearing, Lippman testified that the treasurers have complete autonomy in the management of the box office without any input from her. Lippman testified that the treasurers are responsible for making sure that the money collected corresponds to the value of the tickets sold. Lippman testified that the treasurers attend meetings with members of management infrequently throughout the year. According to Lippman, the treasurers are sometimes called to meetings regarding the box office. Lippman stated that under these circumstances, an assistant-treasurer would also attend the meetings. Lippman testified that the treasurers have made suggestions about company policy with regard to the box office. For instance, Lippman referred to Foley's suggestion that the box office statement should be updated and to Campbell's suggestion that management shorten the time period that the Huntington Theatre is allowed to sell tickets.⁵ Lippman stated that both suggestions were adopted.

The Employer introduced a job description of the treasurers' duties. Lippman drafted the document in November 2000 to advertise a then-available treasurer position. The job description attributes the following duties to the treasurers: supervising box office staff, selling for multiple venues, preparing financial statements, setting up shows, accounting for all monies and ticket sales, preparing payroll reports, scheduling, and working closely with Ticket Services Manager and the Subscription and Group Sales departments. The Union and Campbell were not aware of the job description.

Campbell testified that the treasurer is no different from any other staff in the box office and that the treasurer has no authority over anyone in the box office.⁶ According to Campbell, in the past year, the duties of the treasurer have been significantly diminished. For instance, traditionally the treasurer had handled press nights and had given away tickets to fill the house. Now, the Subscription department handles press nights and delegates specific tasks to the treasurers.⁷ In addition, the treasurers formerly worked directly with Ticket Master in setting up shows. Now, although the treasurers communicate with Ticket Master to

⁴ Pursuant to the collective-bargaining agreements, assistant treasurers are paid \$1,126.14 per week and the treasurer is paid \$1,236.22 per week. According to the union, the difference in pay, which is less than 10 percent, is for the additional duties and the night work of the treasurer.

⁵ The Huntington Theatre is a non-profit theatre company operated by Boston University. The Employers have fostered a relationship with the Huntington theatre whereby they present some of their shows at the Wilbur Theatre. Lippman explained that Campbell made that suggestion because each theatre has a different ticketing system, and consequently, it was hard for either theatre to keep track of the number of tickets that were being sold. Campbell's suggestion shortened the time period during which the Huntington had the ability to sell tickets and make changes. As a result, well before the show, the Wilbur had a better accounting of the tickets sold for that show.

⁶ Campbell began her employment with the Wilbur Theatre in 1979 as a telephone operator. In 1981, she began working in the Wilbur's box office as an assistant treasurer, and, in 1984, she became the treasurer.

⁷ Press nights occur when the Employers give promotional tickets to members of the media in exchange for advertising time on a local radio or television.

a limited extent, the information Ticket Master needs regarding ticketing is provided to them by the Employer's administrative office. Further, in the past, the treasurer decided which seats to fill in order to dress the house.⁸ Now, the Group Sales department specifically informs the treasurer which seats they want filled for the shows.

Campbell testified to attending meetings with Lippman and Katz to discuss production needs, mostly regarding ticketing. According to Campbell, most of the meetings have been regarding ways to improve ticketing services with other theatres, especially the Huntington Theatre. Campbell stated that assistant-treasurer DeGruttola has attended some of these meetings because of her experience with work in various theatres.

Campbell testified further that the duties of an assistant-treasurer are not very different from those of the treasurer. An assistant-treasurer is responsible for selling tickets, processing phone orders, processing mail orders, making deposits, and banking. She stated that the main difference between her duties as treasurer and those of an assistant-treasurer is that she does more paperwork involving preparing a box office statement, preparing financial statements, and processing payroll.⁹

B. Training

Lippman testified that the treasurer is responsible for the training of new employees in the box office, including assistant-treasurers and ticket sellers.

Campbell testified that she was never told that she had the responsibility to train staff. According to Campbell, the box office staff is highly experienced, and, as a result, she has not had the occasion to train anyone. In the rare instance when an employee has a problem with task performance, anyone in the box office helps. Campbell testified that she showed an assistant-treasurer how to prepare the box office statement because Campbell was not going to be in the office to prepare it that night.

C. Hiring

Section 36.10 of the Colonial's agreement provides that all box office personnel employed by the Employer shall be subject to the approval of the treasurer; however, the treasurer shall not withhold such approval on the basis of union affiliations. Section 35.9 of the Wilbur Theatre's agreement contains the same language. Article 27 of the Colonial's agreement and Article 26 of the Wilbur's agreement provide, in part, that the Employers must 1) give the Union advanced notice of vacancies in the unit; 2) grant preference to persons who previously worked in the Greater Boston area or within the area jurisdiction of the Union; and 3) consider all bargaining unit employees first.

⁸ Dressing the house entails selling tickets in a strategic way, such that the theatre will appear to be relatively full, even when many seats remain unsold.

⁹The box office statement is an accounting of the net sales for a given performance. Net sales is the difference between expenses incurred as a result of sales, including commissions, from gross sales. Payroll preparation entails entering the hours worked by each employee in a computer program. The payroll report is then generated from that program.

Consistent with the provisions of the Agreement, the Union keeps a list of existing members who are available for work. When the Employer needs to hire someone, the Union has the obligation to furnish the Employer with the list. There is no formal steward in either box office. Therefore, the treasurer serves as a liaison between the Employer and the Union.

It is undisputed that Foley, the Colonial's treasurer, has not had the opportunity to exercise his authority to recommend the hire or to hire staff.

Lippman testified that, in 1999, two assistant-treasurers who worked at the Wilbur Theatre left their positions. Campbell referred to the Union's list and recommended Colburn and DeGruttola to fill the positions. Lippman approved the recommendations and Campbell offered the positions to them. According to Lippman, she did not play an active role in the hiring of either individual. She did not interview Colburn or DeGruttola, nor did she offer them the position. Lippman stated that she did not know whether Campbell considered other candidates or the reasons Campbell recommended Colburn and DeGruttola. Lippman conceded that at the time the two other assistant-treasurers left, Colburn was the only other employee, beside Campbell, who was still working at the Wilbur. Lippman testified that there were occasions when treasurers have hired assistant-treasurers without consulting with her. According to Lippman, no treasurer has hired anyone in the recent years.

Campbell testified that, generally, if employees were laid off at the Colonial, Lippman and Katz would send them to the Wilbur and vice-versa. As a result, there is a core group of employees who were familiar with the routine and the systems of both theatres. Thus, when there is an opening, it is easy to recommend someone from that pool of employees. In addition, when referring someone to Lippman, she considers the fact that Lippman has worked in the industry for a long time and is familiar with some individuals whom Lippman either knew personally or has worked with periodically. Campbell stated that she recommended Colburn because, at the time, he worked as an extra occasionally at the Wilbur and he was the person with the most seniority on the list of members available to work. According to Campbell, she recommended DeGruttola because she knew that DeGruttola was out of work at the time, that she had a good reputation, and that DeGruttola worked with Lippman in the past at the Boston Ballet. In both cases, according to Campbell, she recommended Colburn and DeGruttola because Katz and Lippman seemed to have a comfort level with individuals who previously worked in theatres and she knew Lippman knew both of these individuals. Campbell testified to one time, some years ago, when she recommended someone to Lippman and Lippman did not hire the person.

D. Assignment and Direction of Work

According to the Employer, the treasurer assigns work to the assistant-treasurers without the assistance or aid of any Director. Lippman testified that the treasurer directs the assistant-treasurers to perform various tasks assigned including selling tickets, processing ticket orders to be mailed, fulfilling group sales, fulfilling membership and subscription tickets, and preparing financial reports. The treasurer has sole discretion in the assignment and direction of work to be performed in the box office. Lippman conceded in her testimony that she has not had the opportunity to personally observe how and if the treasurer makes these decisions.

Campbell testified that she does not assign work to anyone. The office is small; the staff is very experienced. As a result, they come in and immediately report to their work stations and start doing their work. According to Campbell, during performance weeks, the treasurer does not report to work until one or three o'clock in the afternoon. On those occasions, the assistant-treasurers and the ticket sellers report in the morning and perform their tasks without anyone telling them what to do. Under certain circumstances, Campbell has asked an assistant-treasurer to prepare payroll or prepare the box office statement. There is no evidence that assistant-treasurers are disciplined in any way if they refuse to prepare the report.

E. Scheduling

Article 12.0 of the Agreement, entitled Scheduling, provides that box office employees must not work more than 8 hours in a calendar day or more than 40 hours in one calendar week. It provides further that management agrees that the scheduling of hours for employees in the box office shall be the prerogative of the treasurer consistent with the terms provided in this agreement and that the treasurer will present a schedule to the employer each week for approval prior to posting.

Lippman testified that the treasurer is responsible to schedule the box office staff. According to Lippman, the treasurer maintains a written schedule of all box office employees and determines the days and hours of work of the assistant treasurers. Lippman stated that she reviews the schedule for essentially two reasons: to make sure that 1) the hours of operation are in fact covered, and 2) that the correct number of employees are listed. She stated further that she occasionally makes changes to the schedule to ensure that there is coverage for the week. Lippman testified that she makes the changes to reflect changes in hours of operations of the theatres. Lippman testified further that the treasurer is responsible to ensure that box office employees have worked the hours they claim.¹⁰

Campbell testified that the box office employees choose the days and hours they want to work. According to Campbell, there has never been a dispute over scheduling in the box office. For the most part, the box office employees work a routine schedule. If an employee is unable to work his or her usual hours, someone else volunteers to cover the hours.¹¹ Subsequently, consistent with the terms of the Agreement, someone from the box office, usually the treasurer, faxes the schedule to Lippman for approval. The Union presented schedules that demonstrate that the box office staff fills out the hours they want to work for

¹⁰ The employees do not punch a time clock. Instead, they fill out timesheets that they sign at the end of the week. All the timesheets are in turn attached to the payroll report and forwarded to Lippman.

¹¹ Campbell testified to occasions where Kathryn Morris, an assistant treasurer who work occasionally at the Wilbur, worked two hours one day for DeGruttola, who could not work those hours. According to Campbell, DeGruttola asked Morris directly whether Morris could cover for her and Morris agreed. Campbell testified that if Morris was not already in the office, she would have called Morris directly and asked her if she could cover for DeGruttola. According to Campbell, she talks to Lippman very often about bringing Morris in for coverage and Lippman usually approves Morris for 20-30 hours a week. Therefore, Campbell stated that she would not have to consult with Lippman because Morris would have already been approved for hours for the week.

the week.¹² There is no evidence that either treasurer has required an employee to work on a given day.

F. Overtime

Article 5 of the parties' collective bargaining agreements provides that the Employer must approve all work in excess of 40 hours.

Lippman testified that the treasurer has complete autonomy in assigning overtime. According to her, Sunday is generally not a premium day for employees at the Wilbur theatre. Therefore, employees at the Wilbur obtain overtime pay only for hours in excess of 40 hours in a given week, which Lippman must approve in advance. Sunday is a premium day at the Colonial Theatre. According to Lippman, the treasurer decides who will work overtime in a given week. Lippman stated that she knows that the treasurer makes that decision because the treasurer put together the schedule and submits it to her. According to Lippman, if the treasurer submits the schedule, it is because the treasurer approves of it. Lippman testified further that she has never personally observes how the treasurer makes decisions regarding assignment of overtime.

Campbell testified that the assistant-treasurers have decided that overtime would be rotated among them.¹³ According to Campbell, when the office is backed up, she calls Lippman and notifies her. Lippman decides whether to approve overtime or whether to bring in extra help. Campbell stated that there are times when she asks for overtime and Lippman says that, instead, Campbell should bring in extra help. According to Campbell, Lippman usually approves a certain amount of overtime. If the box office becomes busy in the evening, the assistant treasurer who was working during the day usually stays later to help out. According to Campbell, she never ordered anyone to stay overtime; the employees generally stay when they are needed.

G. Discipline

Lippman testified that the treasurers have the authority to discipline employees without input from the Director. There is no evidence that the current treasurers have disciplined any box office staff during their tenure. Lippman testified that, in 1999, the then treasurer, who had the same duties as the current treasurers, reprimanded an assistant-treasurer. According to Lippman, she became aware of the incident because the assistant-treasurer was very upset with the treasurer and reported to her that there had been an exchange between the assistant-treasurer and the treasurer. According to Lippman, she told the assistant-treasurer that she could not interfere because the treasurer had the authority to determine and to administer discipline when warranted. Lippman testified that the treasurer has the authority to resolve customer complaints involving employees at the box office, and is responsible for addressing specific complaints to the employee involved in an effort to resolve them. Lippman admitted that once she received a complaint from a press person regarding an

¹² Campbell testified that Union's Exhibit 6 demonstrates that the two assistant treasurers of the Wilbur, Colburn and DeGruttola, filled out the schedule for the week ending May 5, 2002.

¹³ Because she works at the Colonial when the Wilbur is closed, Campbell had the occasion to observe how overtime is assigned at the Colonial. Because when the Wilbur is closed, she works at the Colonial.

assistant-treasurer at the Colonial Theatre, and she spoke directly with the assistant-treasurer about the complaint. Lippman conceded that she consulted Foley only to find out if he were present during the incident that led to the complaint. Lippman testified that no box office employee has ever been fired or suspended from the theatres.

According to Campbell, the house manager receives and resolves on-site customer complaints. When letters come in with complaints, they are forwarded directly to the house manager. She stated that she is not responsible for disciplining employees.

H. Evaluation

Lippman testified that the treasurer has the authority to evaluate box office employees informally. No evidence was presented to show that has actually occurred.

Campbell testified that there is no formal evaluation system at either theatre. The treasurer has not given or received an evaluation.

I. Vacation

The Employers' vacation policy is somewhat unusual. Employees are not given a specific number of days off per year. Rather, vacation time is computed as a percentage of total pay and the employees determine whether or not they will take vacation in a given year. If an employee decides not to take vacation at all, the employee is left with the extra percentage for the year.

According to Lippman, the treasurer grants vacation requests. Lippman testified that the schedules and the requests for vacation are forwarded to her because she ultimately determines whether there will be enough coverage for the week.

According to Campbell, there is generally no problem with employees' vacation requests. Employees generally decide when they want their vacation, and they put it on the schedule. The Union submitted into evidence a written request for time off in the summer of 2002 that assistant-treasurer Britton made to Foley, the treasurer at the Colonial. Foley then forwarded the request to Lippman for approval, along with the notation that two other employees were available to cover for Britton. It is not clear what the final decision was with respect to Britton's request.

DISCUSSION AND FINDINGS:

I. Appropriateness of the UC petition

First, contrary to the Union's contention, the petition is not barred simply because the Employers agreed in the July 2000 MOA that the treasurers could remain in the unit. Board law is clear that the appropriate time to file unit clarification petition is normally shortly before the expiration of a collective-bargaining agreement. See *Arthur C. Logan Memorial*

Hospital;¹⁴ *Wallace-Murray Corporation*.¹⁵ In the case at hand, the MOA expired August 31, 2002 along with the Agreement. Therefore, the Employers have timely raised the supervisory status of the treasurers.

II. Supervisory status of the treasurers

The Employers assert that the treasurers are supervisors, and as such, should be excluded from the bargaining unit.

Section 2(11) of the Act provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, responsibility to direct them; or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of such a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).

The Board noted in *Phelps Community Medical Center*¹⁶ that the types of supervisory authority are listed in the disjunctive and authority with regard to any one is sufficient to confer supervisory status. *Ohio Power Co. v. NLRB*.¹⁷ Nonetheless, the disjunctive listing of supervisory indicia in Section 2(11) does not alter the requirement that a supervisor must exercise independent judgment in performing the enumerated functions. Thus, the exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, the test of which must be the significance of the judgment and directions. *North Shore Weeklies, Inc.*;¹⁸ *Hydro Conduit Corp.*¹⁹

In *NLRB v. Kentucky River Community Care*,²⁰ the Supreme Court rejected the Board's conclusion concerning whether “professional judgment” in directing less skilled employees to deliver services could also be supervisory independent judgment. Nevertheless, the Court confirmed that generally “[i]t falls clearly within the Board's discretion to

¹⁴ 231 NLRB 778 (1977).

¹⁵ 192 NLRB 1090 (1971).

¹⁶ 295 NLRB 486, 489 (1989).

¹⁷ 176 F.2d 385 (6th Cir. 1949), cert. den. 338 U.S. 899 (1950).

¹⁸ 317 NLRB 1128 (1995).

¹⁹ 254 NLRB 433 (1981).

²⁰ 532 U.S. 706 (2001).

determine, within reason, what scope of discretion qualifies [as supervisory independent judgment]."²¹ Additionally, the Court there affirmed the Board's decision to place the burden of proving supervisory status upon the party who claims that such status exists.²²

Here, the record is devoid of any evidence to demonstrate that the treasurers actually direct or assign the work of the staff. The record demonstrates that the box office employees determine their own work hours. The treasurer then compiles the hours on a schedule and faxes it to the Director of Operations for approval. I find that the treasurers' maintenance of the schedule of the box office staff by compiling the preferred hours and days of work of the employees and by faxing them to Lippman for approval before it is posted involves no exercise of independent judgment. This task is routine and clerical in nature and is not indicative of supervisory authority. *Providence Hospital*.²³

Similarly, regarding overtime, Lippman acknowledges that she gives advance approval of overtime. Then, employees sign up for their own overtime and the final schedule is subject to Lippman's approval. Any functioning of the treasurer in this regard is again subject to review by Lippman and is routine and clerical in nature.

Furthermore, the Employers offered no probative evidence to demonstrate that the treasurers grant vacation requests. It is undisputed that the employees decide whether, and when, they will go on vacation. They notify the treasurers who then inform the Director for approval. The ministerial act of forwarding employees' request to the Director of Operations is not a reflection of supervisory authority.

With regard to hiring, there is no evidence that the treasurers have ever hired any employee. While the record shows that Campbell recommended Colburn and DeGrottola, the record does not indicate that the treasurers exercised true independent judgment in taking such actions. Rather, it appears that their recommendations are constrained by factors beyond the treasurers' judgment or control. The contracts limit the choice of candidates by providing a list of available people, and establishing certain criteria for selection. In addition, Campbell's testimony demonstrates that she recommended certain individuals from the Union's list based upon seniority, or because they worked in theatres in Boston and because Lippman knew them. In these cases, Campbell clearly did not assess applicants' qualifications for employment in a process involving the application of sufficient independent judgment required by Section 2(11) of the Act. Cf. *Bay Area-Los Angeles Express*.²⁴

Regarding the power to discipline employees, Lippman's general, sweeping testimony is contrary to that of Campbell and is unsupported in the record by any particular facts or incidents that demonstrate supervisory authority. Such testimony in itself is not sufficient to

²¹ *Id.* at 713.

²² *Id.* at 710-712.

²³ 320 NLRB 717, 727 (1996); See also *Tree-Free Fiber Co.*, 328 NLRB 389, 392 (1999) (review and signing of timesheets of employees on team leader's team is a simple, clerical matter of timekeeping record involving no exercise of independent judgment); *Wirtz Manufacturing Company*, 215 NLRB 252, 254 (1974) (assignments by leaders to employees they know to be competent to do the work are merely routine assignments).

²⁴ 275 NLRB 1063, 1078 (1985) (selection of casuals for permanent employment lacks independent judgment).

confer supervisory status. *Sears, Roebuck & Co.*²⁵ There is no evidence to show that the treasurers are aware of, or have ever exercised, the authority and the powers the Employers attribute to them. Lippman's testimony that on one occasion a treasurer orally reprimanded an assistant-treasurer is an isolated incident that is insufficient to suggest supervisory authority where the record contains no evidence as to the effect of such reprimands on an employee's personnel status. *Passavant Health Center*.²⁶ Consequently, I find that the Employers failed to carry their burden to establish the treasurers exercise disciplinary authority as statutory supervisors within the meaning of the Act.

Overall, the record shows that the treasurers' limited role in the operations of the box office is highly prescribed by the Agreement. The treasurer's slightly greater pay is merely a reflection of their greater technical skills as demonstrated by the additional duties that are assigned to them. The fact that the treasurers sporadically attend meetings with Lippman and Vice-President Katz does not establish they are supervisors. The evidence indicates that the treasurers' attendance at the meetings is for the purpose of discussing production needs, and there is no evidence that personnel or work policies were discussed at these meetings. *J. C. Brock Corp.*²⁷

The Employers maintain that the treasurers, as the highest-ranking employee in the box office of the theatre, must be found to be supervisors, because otherwise there would be no other supervisors at the theatres. Nothing in the statutory definition of "supervisor" suggests that service as the highest-ranking employee on site requires finding that such an employee must be a statutory supervisor. See *VIP Health Services v. NLRB*,²⁸ cited with approval in *Training School at Vineland*;²⁹ see also *Beverly Enterprises v. NLRB*.³⁰ In this case, the Director of Operations is readily available by telephone or fax, and the treasurers cannot implement non-routine decisions without first seeking Lippman's approval. Under these circumstances, the treasurers cannot be held to be supervisors within the meaning of the Act.

Lastly, the Employers noted that in a recent decision in Region 5 involving a box office treasurer, the Regional Director found that individual to be a supervisor within the meaning of the Act.³¹ A determination of supervisory status is predicated on record evidence

²⁵ 304 NLRB 193 (1991).

²⁶ 284 NLRB 887, 889 (1987).

²⁷ 314 NLRB 157 (1994).

²⁸ 164 F.3d 644, 649-650 (D.C. Cir. 1999) (if an employee does not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it).

²⁹ 332 NLRB No. 152 (2000).

³⁰ 148 F.3d 1042, 1048 (8th Cir. 1998) (where a statutory supervisor is available by telephone or pager, the highest ranking on-site employee will not invariably be considered a supervisor.)

³¹ The case in issue is *Theatre Management Group and Treasurers and Ticket Sellers, Local 868, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO.*; Case 5-UC-384, issued July 23, 2002.

in a given case.³² Here, the record does not demonstrate that the treasurers are supervisors within the meaning of the Act.

ORDER

IT IS HEREBY ORDERED that the petitions be, and they are, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by October 4, 2002.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
National Labor Relations Board
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Dated at Boston, Massachusetts
this 20th day of September, 2002

385-7500-2593
177-8520-1600
177-8520-2400
177-8580-7800

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³² In that case, the Regional Director's findings that the treasurer is a supervisor is predicated on record evidence that the treasurer exercised independent judgment in her search for box office staff.